Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., and	)	CC Docket No. 98-121
BellSouth Long Distance, Inc. for Provisions	)	
of In-Region, InterLATA Services	)	
In Louisiana	)	

REPLY BRIEF OF AT&T CORP. IN SUPPORT OF MOTION FOR EXPEDITED DECISION ON PENDING PETITION FOR RECONSIDERATION

AT&T Corp. ("AT&T") respectfully submits this reply brief in support of its motion for expedited decision ("Motion") on its November 12, 1998 petition for reconsideration of the Commission's ruling that a Bell Operating Company ("BOC") that has been granted section 271 authority may, notwithstanding its continuing obligations under 47 U.S.C. § 251(g) to provide "equal access" to all long distance carriers, expressly channel customers to its own long distance service when they call to obtain local service. *See Application of BellSouth Corp. et al. For Provision of In-Region, InterLATA Services in Louisiana*, CC Docket 98-121, ¶¶ 356-60 (Oct. 13, 1998) ("*BellSouth Order*"); Petition of AT&T Corp. for Reconsideration and/or Clarification, CC Docket 98-121 (filed Nov. 12, 1998) ("*Reconsideration Petition*").

BellSouth, Bell Atlantic and US WEST (collectively, "BOCs") oppose the Motion, but they do not even seriously address the central issue raised by the Motion: whether, in the face of direct evidence that BOCs can and do use the Commission's erroneous ruling in the *BellSouth Order* to justify patently anticompetitive marketing practices, the Commission should promptly act on AT&T's request that the Commission reconsider that ruling. BellSouth feigns concern (at

6-7) that "the same legal arguments" are currently pending before the D.C. Circuit in an appeal arising out of another § 271 proceeding. But the fact that the Commission's delay in resolving the *Reconsideration Petition* has caused the same issue to arise in other proceedings hardly justifies further delay in the Commission's reconsideration of its joint marketing decision. It is beyond dispute that an agency is not estopped from correcting its own legal error merely because the same issue is pending before a court in another proceeding.

Nor will any complaint that AT&T files against Bell Atlantic for its flagrant abuses of the improperly lax *BellSouth* joint marketing decision obviate the clear need for the Commission immediately to resolve the *Reconsideration Petition* and realign its rulings with the requirements of the Act. *See* BellSouth Opp. at 7. To the contrary, Bell Atlantic's unlawful conduct underscores the need for an immediate return to the bright-line equal access requirements that are compelled by the Act and that have served consumers well for over a decade. Even though a complaint against Bell Atlantic would, as BellSouth admits (at 7), "clarify the obligations of the BOCs," the bright line approach that the Act's plain terms require would make it far simpler to ensure compliance by the BOCs' representatives.[1]

And U S WEST's claim (at 3) that the Commission should be in no hurry to act in this proceeding because a reversal of the *BellSouth Order* "would not necessarily bind other BOCs to the change of administrative position" is simply wrong. Other BOCs are, of course, bound by § 251(g) itself. Thus, if the Commission reconsiders the *BellSouth Order* and properly interprets § 251(g) to forbid BOCs from preferentially marketing their own long distance services (as the

[1] In this regard, Bell Atlantic's claim (at 7) that its compliance will be "fully tested" in the Section 272 biennial audit has no bearing whatsoever on this motion or the underlying petition, and even with regard to Bell Atlantic's own misconduct, the audit is apparently not a sufficient deterrent mechanism to prevent violations of the Act. Because the audit is biennial, it is plainly appropriate to supplement monitoring of Bell Atlantic's conduct where, as here, there is sufficient evidence of ongoing violations.

Commission did in prior orders), that will remove any conceivable basis for US WEST and other BOCs to claim that they may engage in such discriminatory marketing when they obtain long distance authority. In short, there is no legitimate basis for the Commission to refuse to decide the fully developed and purely legal issues raised in AT&T's Reconsideration Petition.

Recognizing as much, the BOCs devote the bulk of their "oppositions" to a rehash of their arguments as to why, in their view, the Commission should deny the *Reconsideration Petition.* But the BOCs cannot deny that: (1) the equal access precedents that predate the Act expressly prohibit preferential inbound telemarketing, (2) under the plain terms of section 251(g), those restrictions remain effective and binding until the Commission supercedes them by regulation, and (3) the Commission has issued no regulations superseding those restrictions. That should be the end of the matter.

BellSouth complains that a plain language construction of § 251(g) to carry forward longstanding neutrality requirements for inbound calls would "nullify" the BOCs' § 272(g) joint marketing right. BellSouth Opp. at 3. As AT&T explained in its Petition and its motion, however, there are countless opportunities for the BOCs to jointly market their local and long distance services, including outbound telemarketing, direct mail, retail stores, promotional events, and television, radio, and print advertising. Section 251(g) merely prevents the BOCs from unfairly exploiting marketing opportunities that arise solely as a result of their enduring local market power. Continuing the equal access and strict neutrality requirements for one category of marketing – inbound calls – *is* a "balanced approach" that gives significant meaning to the equal access and nondiscrimination requirements while at the same time affords the BOCs ample ability to market jointly their local and long distance services.[2]

[2] Thus, while Bell Atlantic (at 4-5) states that a "general provision cannot trump a more specific [one]," it has its provisions backwards: the general rule under § 272(g) is that a BOC with 271

Nor is the equal playing field contemplated by § 251(g) any threat to "one-stop shopping." *See* Bell Atlantic Opp. at 5. Customers are free, if they choose, to buy both local and long distance service from a BOC with § 271 authority. Indeed, nothing prevents customers from purchasing such bundles on inbound calls to Bell Atlantic, so long as Bell Atlantic complies with the equal access and nondiscrimination principles that Congress expressly carried forward in Section 251(g).[3] Any suggestion that the equal access rules deny customers a choice turns those provisions on their heads. By following the equal access rules and requiring neutrality, the Commission would in fact *help* customers make an affirmative, informed choice whether to buy a bundle of services from a single carrier by prohibiting the BOC from unfairly using its local market power to influence that choice.[4]

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authority may market services jointly with an affiliate, but § 251(g) contains specific exceptions where that joint marketing would interfere with core equal access policies.

[3] Bell Atlantic (at 5-6) claims that one statement from a paper that former Congressman Ward inserted into the record "makes clear" that Congress did not intend to place any limits on the BOCs' marketing rights. Even making the charitable assumption that such a snippet of legislative history offers any insights into Congress' intent, it could not possibly override the textual command that Congress included in Section 251(g). Moreover, nothing in sections 271 or 272 suggests that BOCs must enjoy joint marketing rights that are co-extensive with other carriers. Indeed, all BOCs but one are still precluded from joint marketing even though other carriers may freely do so now that section 271(e) has expired. And even for BOCs that have been authorized under section 271, section 272 lawfully and rationally imposes numerous requirements solely on BOCs for the very same reasons why the neutrality requirement here is appropriate – their enduring market power.

[4] Contrary to BellSouth's suggestion (at 4-5 n.3), the Commission cannot – and has not – in this (or any other) adjudicatory proceeding terminated "by regulation" existing equal access regulations. *Perales* v. *Sullivan* is directly on point: the Court there held that a statute stating that an agency "shall by regulation" take certain action meant that Congress had "instruct[ed]" the agency "how to implement the statute: [it] must validly promulgate regulations." 948 F.2d 1348, 1356 (2d Cir. 1991). And it is ludicrous to suggest that any prior action by the Commission has "explicitly superseded" (§ 251(g)) the equal access regulations. Indeed, *after* the *Non-Accounting Safeguards Order* and the *BellSouth South Carolina Order*, the Commission expressly acknowledged that it had never purported to supersede such requirements and that the equal access requirements were still binding. *AT&T* v. *Ameritech*, 13 FCC Rcd. 21438, ¶¶ 53, 63

The BOCs argue that the First Amendment may nonetheless divest the Commission of power to enforce § 251(g). This contention should be rejected out of hand. As Bell Atlantic and BellSouth concede (*see* Bell Atlantic Opp. at 5-7; BellSouth Opp. at 5 n.4), joint marketing by BOCs can claim, at most, only the limited constitutional protection available for "commercial speech." The Supreme Court has held that it is constitutional to restrict commercial speech "if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (upholding ban on advertising of legalized gambling). This standard is readily satisfied here.

The governmental interest supporting equal access duties is to preserve fair competition – that is, a level playing field – in long distance. Without question, preserving fair competition is a "substantial" government interest. Indeed, the Supreme Court held as much in *Turner Broadcasting Co.* v. *FCC*, 512 U.S. 622 (1994): "[T]he Government's interest in eliminating restraints on fair competition is *always* substantial." *Id.* at 664 (emphasis added).

There also can be no question that enforcing the Act's equal access requirements as written directly advances that interest. If BOCs were allowed to sign up long distance customers by steering them away from other long-distance carriers – or, as revealed in AT&T's market study of Bell Atlantic's practices in New York, outright concealing from subscribers the fact that they do indeed have a choice of long-distance carriers – then there will no longer be any level playing field in long distance.

(1998). The Commission also noted that it intended to undertake a "rulemaking, as contemplated under section 251(g)." *Id.*

Bell Atlantic asserts that "[a]ny conceivable governmental concern is addressed by reminding callers that they have a choice of long distance carriers, and, if a caller is uncertain, offering to provide a list of those carriers." Bell Atlantic Opp. at 6-7. This assertion not only misstates the Commission's existing rules but also is misplaced.[5] Even assuming, *arguendo*, the sufficiency of that proposed remedy, the law is clear that the reduced scrutiny to which commercial speech is subject does *not* require use of the least restrictive alternative for furthering the government's interest. *See Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 632 (1995) (noting that "the 'least restrictive means' test has no role in the commercial speech context"). Thus, as long as the "equal access" requirements represent a "reasonable" means of advancing the interest in fair competition (*id.*) – and *no one* argues that they do not – then they are sufficiently tailored to pass First Amendment scrutiny.

In any event, Bell Atlantic's proposed measure is not an effective means of promoting fair competition in long distance. Even if the disclosures Bell Atlantic proposes were rigorously given – and, as AT&T's market study showed, they are not – the fact remains that consumers will be more likely to select BOCs for long-distance service, regardless of service cost or quality, absent equal access. This is because BOC phone representatives would be able to put their captive consumers on the spot to make a choice based only on information from the BOC, relegating the subscriber to having to make separate calls to find out what other long-distance companies are offering. This is hardly the level playing field that the "equal access" requirements are designed to preserve. Equal access requirements prohibiting BOCs with market power from favoring their long-distance affiliates in presubscription discussions with

[5] The Commission's prior holdings require more than simply notifying an inbound caller that the caller may choose from among many carriers and offering to read a list of such carriers. *See Order*, ¶¶ 356-58; *BellSouth South Carolina Order*, ¶¶ 231-39.

subscribers, but leaving the BOC affiliates with the same rights as their long-distance competitors to appeal to subscribers through advertising or mail solicitations, are the *only* way to achieve the substantial government interest at issue here. Contrary to Bell Atlantic's puzzling suggestion that equal access requirements lower a "cone of silence" over BOCs (Bell Atlantic Br. at 7), such requirements guarantee BOCs the *same* ability to appeal to customers for their business as other long-distance companies have, thereby providing greater information to consumers and enhancing their ability to make informed choices.[6]

Finally, the Commission should reject Bell Atlantic's attempts to use this proceeding to defend its illegal marketing practices in New York. Bell Atlantic (at 7-9) claims that AT&T's study of Bell Atlantic's marketing practices is "wrong" while also asserting, in the same breath, that it has no obligation to comply with the Commission's existing rules for the types of calls that the study investigated. Bell Atlantic's explanation cries out for an investigation of what its practices in fact are with respect to such calls. But that issue is more properly resolved in the complaint case that AT&T intends to institute against Bell Atlantic, and does not affect the merits of this motion or the underlying petition.[7]

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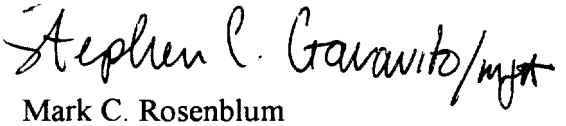
[6] Bell Atlantic's surmise that "customers already are aware that they have choices for long distance service" (Bell Atlantic Opp. at 7), even if accurate, obviously cannot justify BOCs in withholding that information from consumers, any more than the fact that most Americans have seen detective shows can excuse police from giving *Miranda* warnings. *See Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (dismissing as "minimal" a claimed "interest in not providing any particular factual information in [a firm's] advertising").

[7] There was nothing improper in AT&T's effort to monitor Bell Atlantic's compliance with the law by arranging for telephone calls to Bell Atlantic service centers. Indeed, in its section 271 application, Bell Atlantic touted third party investigations into its compliance with the Act as a reason to grant its application. AT&T's study surely imposed far fewer burdens on Bell Atlantic than those efforts, yet Bell Atlantic seeks to squelch such efforts in hopes of depriving competitors of the only possible means of detecting Bell Atlantic's violations. And AT&T's study, designed to determine whether Bell Atlantic was complying with the law, is in no way similar to Time Warner's practices, which were alleged to have been conducted solely to gain competitive advantage.

CONCLUSION

For the foregoing reasons, the Commission should promptly grant the Petition's request that the Commission reconsider its joint marketing ruling in the Order and declare that no BOC may endorse its own long distance service in a customer-initiated local service call.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2000, I caused true and correct copies of the foregoing Reply Brief of AT&T Corp. in Support of Motion for Expedited Decision on Pending Petition for Reconsideration to be served on all parties by first class mail, postage prepaid to the addresses on the attached service list.

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